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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SHICOREY LEE SMITH,

Defendant and Appellant.

B281860

(Los Angeles County
Super. Ct. No. BA437361)

APPEAL from a judgment of the Superior Court of Los Angeles County, David V. Herriford, Judge. Conditionally reversed and remanded with directions.

Donna Ford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Jonathan M. Krauss and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Shicorey L. Smith appeals from the judgment after a jury convicted him of second degree robbery and carrying a loaded firearm. Smith requests that we independently review the transcript from the trial court's *Pitchess*¹ hearing. Smith also requests that we remand so the trial court may exercise its discretion under amended Penal Code² section 12022.53 to strike his 10-year firearm enhancement. The Attorney General (respondent) does not oppose either request.

We conclude the trial court erred in not disclosing one of the documents it reviewed during the *Pitchess* hearing. We therefore conditionally reverse the judgment and remand so defense counsel may review the document and have an opportunity to demonstrate prejudice. We also direct the trial court to exercise its discretion under section 12022.53.

PROCEDURAL BACKGROUND

The facts of the underlying offenses are not at issue in this appeal so we limit our summary to the relevant procedural history.

An information charged Smith with one count of second degree robbery (§ 212.5, subd. (c)) and one count of carrying a loaded firearm (§ 25850, subd. (a)). The information alleged that Smith had personally used a firearm in committing the robbery (§ 12022.53, subd. (b)).

Smith filed a *Pitchess* motion seeking relevant records from the personnel file of Detective Gerald Harden of the Los Angeles Police Department. Smith's motion was based on his assertion

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

² Undesignated statutory citations are to the Penal Code.

that Harden had threatened to call the Department of Children and Family Services and have Smith's children taken from him if Smith did not cooperate with the investigation and admit to committing the robbery. Smith claimed that his subsequent statements admitting to the robbery were coerced and false.

The trial court granted the motion as to any "complaints for dishonesty as to Detective Harden." The prosecution requested the trial court's order be limited to complaints regarding coerced confessions. The trial court denied the limiting request. The trial court then conducted an in camera hearing and concluded there were no responsive items in Harden's file.

A jury convicted Smith of all counts and found that Smith had personally used a firearm in committing the robbery. The trial court sentenced Smith to 12 years 8 months, including 10 years for the firearm enhancement under section 12022.53, subdivision (b), and imposed fines and fees and awarded credits.

Smith timely appealed.

DISCUSSION

A. The trial court erred in concluding there were no complaints responsive to Smith's *Pitchess* motion

When requested to do so by a defendant, we independently review the transcript of the trial court's in camera *Pitchess* hearing to determine whether the trial court disclosed all relevant complaints. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.) Smith has made such a request, and respondent does not object. We review a trial court's ruling on a *Pitchess* motion for abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.)

Having reviewed the *Pitchess* hearing transcript, we conclude there was a responsive document the trial court failed to disclose. The trial court described a complaint, numbered 14002194, that Harden had threatened to harm or harass the two complainants if they did not cooperate with an investigation. When an officer investigated the complaint, one complainant refused to provide any further information, and the officer could not reach the other complainant.

The trial court ruled this complaint was not responsive to Smith's motion, stating that the complaint did not allege that Harden "lied, falsified a police report, or anything of that nature." The trial court concluded "the allegation that [Harden] somehow threatened [one of the complainants] to provide information" was insufficient to constitute coercion given that the complainant had not provided any details. The trial court further concluded that the allegations were dissimilar to those in Smith's case.

We disagree with the trial court. Smith's motion was based on allegations that Harden had threatened him in order to force him to cooperate with a criminal investigation. The complaint reviewed by the trial court alleged similar facts. Although the complaint could not be substantiated given a lack of further information, "[u]nsustained complaints are discoverable as well as sustained complaints." (*People v. Zamora* (1980) 28 Cal.3d 88, 93, fn. 1.) Nor does it matter that the complaint may have been inadmissible, because the trial court was obliged to disclose "information that is not itself admissible but which 'may lead to admissible evidence.'" (*People v. Gaines* (2009) 46 Cal.4th 172, 182 (*Gaines*).)

Pitchess error does not require reversal absent a showing of prejudice. (*Gaines, supra*, 46 Cal.4th at p. 182.) The trial court

shall direct the Los Angeles Police Department to disclose the complaint numbered 14002194 to defense counsel, who shall then be given the opportunity to demonstrate prejudice. The trial court shall grant a new trial if there is “a reasonable probability of a different outcome had the evidence been disclosed.” (*Ibid.*) Otherwise, the judgment shall be reinstated. (See *People v. Wycoff* (2008) 164 Cal.App.4th 410, 416.)

B. On remand, the trial court should exercise its discretion to strike or refrain from striking Smith’s firearm enhancement

At the time the trial court sentenced Smith, the 10-year firearm enhancement under section 12022.53, subdivision (b) was mandatory and could not be stricken. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079 (*Billingsley*).) Effective January 1, 2018, the Legislature amended the Penal Code to give the trial court discretion to strike the enhancement. (*Billingsley*, at pp. 1079-1080.) Respondent concedes the amendment applies retroactively to Smith’s sentence. (See *id.* at p. 1080.)

Smith requests that we remand so the trial court may exercise its discretion whether to strike the firearm enhancement. Respondent does not oppose this request. Accordingly, we grant it.

DISPOSITION

The judgment is conditionally reversed and the cause remanded. The trial court shall direct the Los Angeles Police Department to disclose the complaint numbered 14002194 to defense counsel. The trial court shall then conduct further proceedings consistent with this opinion. If the trial court finds that Smith has not established prejudice by the denial of discovery, the judgment shall be reinstated as of that date.

The trial court is further directed to exercise its discretion under section 12022.53 to strike or refrain from striking Smith's firearm enhancement. If the trial court strikes the enhancement, the trial court shall reduce the sentence accordingly, amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.